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No. 03-662

Supreme Court, U.S.
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In The Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel.
DOUGLAS GOLDEN, and DOUGLAS GOLDEN,

Petitioners,

v.

ARKANSAS STATE GAME & FISH COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents do not agree that the questions presented by the Petitioner constitute a proper claim for the granting of a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in this case.

PARTIES TO THE PROCEEDING

The Petitioner Douglas Golden ("Petitioner" or "Golden") incorrectly and erroneously states that the Arkansas Game and Fish Commission ("AGFC") is a Respondent to this proceeding along with the Chief Executive Officer/Director of AGFC, Steve Wilson, ("the Director"), and AGFC Commissioners Stephens, Bridgeforth, McCollum, Hinkle, Sitzes, and Wood (collectively "the Commissioners").

Shortly after this matter was commenced in the U.S. District Court for the Eastern District of Arkansas, AGFC, the Director, and the Commissioners filed a Motion to Dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. On January 17, 2002, the District Court dismissed all of Petitioner's claims against AGFC as an agency and also dismissed Petitioner's claims under the False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"), and under 42 U.S.C. § 1983 for damages against the Director and Commissioners in their official capacities. This left pending Petitioner's FCA and section 1983 claims against the Director and the Commissioners in their individual capacities, plus section 1983 claims for injunctive relief against the same individuals in their official capacities.

On September 9, 2002, the District Court granted the Director and Commissioners' Motion for Summary Judgment on the remaining claims. Petitioner appealed this second decision to the Eighth Circuit Court of Appeals, but did not appeal the District Court's January 17, 2002 order. *U.S. ex rel. Golden v. Arkansas Game & Fish Comm'n*, 333 F.3d 867, 870-71 (8th Cir. 2003), reprinted in Petitioner's Appendix at 4a-5a.

PARTIES TO THE PROCEEDING – Continued

Thus, the only proper Respondents to this proceeding are the Director and the Commissioners.

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OPINIONS BELOW

The opinions of the lower courts are accurately set forth by Petitioner.

JURISDICTION

Petitioner has accurately set forth the basis of jurisdiction.

RELEVANT PROVISIONS

Petitioner incorrectly and erroneously states that this case involves interpretation and application of Title VII of the Civil Rights Act of 1964 and that Title's definition of "employer." Petitioner brought this lawsuit on behalf of the United States under the *qui tam* provisions of the FCA, and on his own behalf alleging that his discharge was in violation of the whistleblower protection provision of the FCA and also in violation of 42 U.S.C. § 1983. The FCA and § 1983 are the only statutory provisions involved in this case. Petitioner has asserted no claim in this action based upon or involving Title VII.

STATEMENT OF THE CASE

The AGFC is a constitutional agency of the State of Arkansas which is charged with the responsibility for managing the state's wildlife and fishery resources for the benefit of the people of Arkansas. AGFC is governed by a group of eight commissioners. Seven of these Commissioners were named as defendants in this action filed June 5,

2001, and were sued both individually and in their capacities as Commissioners. The Commissioners constitute an advisory, administrative and policy-making board that make rules and regulations for carrying out the purposes of the AGFC. The AGFC Director was also named as a defendant in this matter, both individually and in his capacity as Director.

On August 15, 2001, the United States Government declined to intervene as a plaintiff pursuant to the False Claims Act. Afterwards, as previously stated, the District Court dismissed from this action AGFC and the Director and the Commissioners, in their official capacities (except for the section 1983 claim for injunctive relief), by Order dated January 17, 2002. That Order was never appealed by Petitioner.

Petitioner Golden began work for AGFC on October 3, 1983, and was promoted over the next years until he achieved the position of Biologist I in 1993 or 1994. In February 1996, Wildlife Management Division Chief Don Akers informed Golden's supervisor, Robert Zachary, of complaints received from the public that AGFC personnel had been observed congregating at the Jonesboro Holiday Inn Restaurant during business hours. Inasmuch as this was counter to the public image AGFC sought to foster, Akers directed that such activity be stopped. Because Golden was one of those employees who had been seen at the Holiday Inn coffee shop, Zachary verbally directed Golden and co-worker Lynn Fair to discontinue afternoon gatherings and coffee breaks at that location. Although Golden halted visits to the Holiday Inn for a few weeks, he resumed visiting this location during business hours after Akers left the Division Chief's job for a new position on June 16, 1996.

Petitioner's failure to follow Zachary's verbal directions resulted in a memo being sent to Golden on August 14, 1996, from Zachary, prohibiting Golden from entering the Jonesboro Holiday Inn Restaurant while on duty, in uniform, or driving an AGFC vehicle, and indicating to Golden that disregard of those instructions would result in disciplinary action.

On August 19, 1996, Golden prepared a memo to Zachary in response to the August 14 memo from Zachary to Golden. In this August 19, 1996, memo, Golden further admitted that when Don Akers had left his post as Wildlife Management Division Chief, that he, Golden, had "quit complying with his [Akers'] request" to stop frequenting the Holiday Inn coffee shop. Golden also admits that no one ever rescinded Akers' directive. Golden sent this memo to Scott Yaich, the then-Wildlife Management Division Chief, and one of Zachary's supervisors.

In this memo Golden accused Zachary of being "bad under the influence of alcohol" in public in the presence of two Arkansas State Troopers at the Jonesboro Holiday Inn, while on duty and in an AGFC vehicle. Golden admitted that he did not witness Zachary himself but had relied upon alleged statements by Arkansas State Trooper Phil Carter. Phil Carter testified that Zachary was not intoxicated in his presence and he had not told anyone that Zachary was intoxicated. Carter further testified that he never told anyone that Zachary was in uniform and he did not know what kind of vehicle Zachary was driving when he came to the Holiday Inn. In response to this August 19, 1996, memo from Golden, Wildlife Management Division Chief Scott Yaich conducted an investigation into Golden's activities and the allegations Golden made against Zachary. This investigation included interviewing a number of

AGFC personnel, one of the State Police officers referenced in Golden's memo, and the captain of the Jonesboro State Police Headquarters. Yaich's investigation found that there was no evidence that any of the allegations Golden made against Zachary had any merit or basis in fact. By memo to Golden dated January 2, 1997, Yaich made these findings known to Golden.

In his memo to Golden, Yaich noted that Golden had admitted insubordination wherein Golden had stated that "after Don Akers left, I quit complying with his request" to steer clear of the Holiday Inn coffee shop. Yaich further noted that his investigation revealed "a generally insubordinate attitude and a specific act of insubordination." Yaich also found a pattern of Golden "attempting to undermine the credibility and authority" of his supervisor with "vague references to unsubstantiated problems, specific allegations of wrongdoing that are entirely without merit, and misuse of supervisory authority in conducting his duties as Project Coordinator."

Yaich found that Golden's "clear insubordination" necessitated his taking action. Therefore, upon Yaich's recommendation, the Director demoted Golden to a Technician III grade effective January 13, 1997. Golden was further placed on one-year disciplinary probation, during which any further violations of AGFC policies would subject Golden to further disciplinary action, up to and including termination.

In March of 1998, the Director received a letter from a citizen complaining that Golden and a co-worker, Lynn Fair, were frequenting the Old South Pancake House restaurant daily "drinking coffee all afternoon." This resulted in a memo being sent to Golden and Fair by the

assistant supervisor under Zachary. In this memo, it was noted that over the previous months complaints had been made about AGFC trucks sitting at the "Pancake House" in Jonesboro in the afternoon. The memo noted that the general public, though not aware of the working hours of AGFC personnel, could be getting the impression that AGFC personnel were spending their time at the coffee shop during normal working hours. Therefore, a new directive was issued, which set specific work hours, and also specifically stated: "At no time during the day, except possibly the lunch hour, are Commission vehicles and uniformed personnel to be seen at any 'coffee shop'." Golden admits receiving this memo.

On December 2, 1998, Golden was observed by a supervisor at the Old South Pancake House in Jonesboro at about 2:30 p.m. Golden was in uniform and his AGFC vehicle was parked outside, in direct violation of the specific written directive. Golden admits to having been there at that time in uniform and in his AGFC vehicle.

As a result of Golden being seen at the Pancake House, Donny Harris, then Chief of the AGFC Wildlife Management Division, commenced an administrative investigation concerning Golden's conduct in early January 1999. As a result of that administrative investigation, and recommendations by Harris through then Assistant Director Scott Yaich, on April 19, 1999, Director Wilson informed Golden by letter that Golden's employment with AGFC was being terminated effective May 7, 1999. Wilson stated in this letter that Golden's latest actions "continue to represent examples of the repetitious, blatant acts of insubordination and a disregard for supervisory authority that has continued for a period of over 2 ½ years."

The Commissioners took no part or role in the decisions to either demote Golden in 1997 or to terminate Golden's employment. In fact, the Commissioners had no knowledge of the decisions to demote or terminate Golden's employment or the actual termination until well after the fact. Golden never contacted any of the Commissioners about his termination. Golden admits he has no knowledge that the Commissioners either took any part in his demotion or discharge, or knew about those events. The decision to terminate Golden was made by Steve Wilson in his capacity as Director of AGFC, based upon the findings of an administrative investigation and the recommendation of Donny Harris, Chief of Wildlife Management to Assistant Director Yaich. The Commissioners were not notified of Golden's termination by Steve Wilson, as the authority to terminate Golden's employment rested with Wilson. Golden admits that he has no knowledge of whether Wilson discussed Golden's demotion or termination with any of the Commissioners. Golden also admittedly did not request an administrative grievance review of the agency's termination decision, which he had the option to pursue.

Golden filed the present action on June 5, 2001, under the *qui tam* provisions of the FCA and on his own behalf alleging that his discharge was in violation of the whistleblower protection provision of the FCA and also in violation of 42 U.S.C. § 1983.

In Golden's *qui tam* action, he alleges that the fraud upon the federal government arose when, in the mid to late 1980s, AGFC employees were instructed to report all their work activities, except administrative duties, under federal aid codes regardless of what they were doing in order for AGFC to receive federal reimbursement in excess

of what it was entitled. However, Golden and Fair admitted that almost all the work they did actually qualified for federal aid. In fact, Golden admits that he cannot give an example of any time he applied as federal aid time, which in fact should not have been credited as work performed in furtherance of federal aid grant programs. Further, Golden admits that he never reviewed any other employees' activity reports to determine if they were in fact misrepresenting their work as eligible for federal aid credit. Golden admitted that he has no knowledge of how any other employees were reporting their work time. And, Golden never reported this alleged "misreporting of work time as federal aid" to anyone at AGFC. Golden further admits that he has no knowledge of any false claims that were known or directed by either Steve Wilson or any of the Respondent Commissioners.[1]

Golden alleges that his claim of retaliation in violation of the whistle-blower provisions of the FCA stems from his having a meeting with Arkansas State Representative Bobby Hogue in which, according to Golden, he related to Hogue fraudulent activity going on at AGFC. Hogue has testified that while a meeting did occur with Golden in 1994, there was no discussion of any fraud and that the topic discussed at the meeting was, instead, the need for

[1] Golden states repeatedly in his Petition that "[a]pproximately 75% of the AGFC budget is derived from federal funds." Petition for Writ of Certiorari, pp. 7, 20. This statement is not only unsupported by any evidence in the case, but also is grossly inaccurate since federal funds historically have comprised no more than approximately 20-25% of the agency's annual budget.

more equipment in northeast Arkansas.[2] Dennis Elkins, who set up and attended the meeting, agrees with Hogue's recollection, and also states that the purpose of the meeting was to try to help promote AGFC employee Bob Rice to become the new Chief of the Wildlife Management Division. Furthermore, Golden admits that he has no knowledge or proof that any other persons at AGFC, including the Director or the Commissioners, were ever aware of his meeting with Hogue.

Concerning Golden's claim that his discharge was in violation of 42 U.S.C. § 1983, Golden alleges that his discharge was in retaliation for his relationship with his grandson, Andrew Golden, who was one of two children accused in the tragic Westside Middle School shooting in Jonesboro, Arkansas on March 24, 1998. However, Golden admits that he has no evidence whatsoever that either the Director or the Commissioners terminated his employment due to his grandson's involvement in the Westside shootings. This is just his opinion.

Golden also alleges as a violation of § 1983 that he had a property interest in his job at AGFC and that he was denied due process in his discharge. Golden alleges that his discharge was a violation of his rights of free speech and freedom of association. Golden further alleges that the Respondents engaged in a conspiracy to deprive him of federally protected rights and state property rights.

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[2] In this Petition, Golden misstates facts in this regard. Golden states that the timing of his first demotion of January 1997 "occurred almost immediately after his conference with Bobby Hogue." This is untrue in that Hogue testified, and Golden admits, that this meeting occurred in 1994, over two years before the demotion.

However, Golden admits that he has no personal knowledge of any agreement by the Respondents to deprive him of any rights. Golden was an at-will employee of the AGFC and had no property interest in his job.

At both the District Court and Eighth Circuit Court of Appeals, it was noted that a valid reason for Petitioner's demotion and termination was offered, *i.e.*, failure to abide by direct orders not to frequent the banned restaurants. Petitioner failed to present evidence that this reason was pretextual. Both courts also noted the failure of Petitioner to present any evidence to establish the necessary elements to make a *prima facie* case under either the FCA or 42 U.S.C. § 1983 against the Director or the Commissioners in their individual capacities, and thus granting of summary judgment dismissing Petitioner's claims was proper. Respondents assert that these decisions were correct and that the Petition for Certiorari should be denied.

ARGUMENT

I. Petitioner Fails to Offer Proper Reasons Why A Writ of Certiorari Should be Granted.

A. Introduction

The Petition herein fails to set forth any valid reason why this Court should exercise its discretion and grant the writ sought. This is a case where Petitioner was demoted, then discharged from his employment for insubordination by blatantly disobeying explicit directives. The lower courts noted that Petitioner offered no proof to indicate that the stated reason for his discharge was merely a pretext for some other reason. The present case is simply

one where Petitioner failed to offer sufficient proof to establish the elements of the claims asserted. The courts below correctly noted that the factual evidence offered by Petitioner, even if true, failed to meet the legal requirements of an FCA claim or a § 1983 claim. This Court will not grant a writ of certiorari merely to review evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938). "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10.

Try as he might, Petitioner cannot establish that the decision of the Eighth Circuit in this case fits any of the criteria set out in Supreme Court Rule 10 so as to merit this Court granting certiorari. A review of Petitioner's asserted basis for his Petition makes this evident.

B. Lower courts' decisions regarding the definition of "employer" do not warrant certiorari here.

Petitioner first asserts that his Petition has merit because of an asserted "confusion among the lower courts regarding the definition of 'employer'." Apparently this argument is aimed at the dismissal below of Petitioner's FCA whistle-blower retaliation claims. The only appeal that Petitioner pursued was the dismissal of his claims against the Director and Commissioners in their individual capacities and his claim for injunctive relief under section 1983 against the Director and Commissioners in their official capacities. The court below held that the FCA whistle-blower provision only provides remedies against

an employer, and since AGFC, not the individual Respondents, were the Petitioner's employer, the FCA retaliation claims against these individuals failed as a matter of law.

No split in authority or interpretation of this application of the FCA has been demonstrated. In fact, the only circuit court of appeals that has directly addressed the issue of whether an individual supervisor can be an "employer" for purposes of the whistle-blower section of the FCA, thereby being subject to individual liability, has unequivocally determined that no such individual liability can exist. *See, United States ex rel. Siewick v. Jamieson Sci. & Eng'g*, 322 F.3d 738 (D.C. Cir. 2003); *Yesudian ex rel. United States v. Howard Univ.*, 270 F.3d 969, 972 (D.C. Cir. 2001). These cases were cited by the Eighth Circuit in its decision below. Remarkably, Petitioner does not even mention these cases.

Despite having never asserted a Title VII claim, Petitioner nonetheless asks the Court to consider grafting a Title VII analysis of who is an "employer" to this FCA case, while disregarding the authority above cited, which is directly on point. Petitioner offers no authority, nor has any been found by Respondents, to support this position. Further, there is no reason to resort to such methods of interpretation. This very Court has held that courts are to interpret Congress' use of a term in light of its history, and presume Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment. *Director, Office of Workers' Compensation Programs, DOL v. Greenwich Collieries*, 512 U.S. 267 (1994).

Further, even were the Court to be inclined to consider this novel approach, the fact is the Petitioner

completely misstates the current state of the law regarding individual liability of supervisors under Title VII. Petitioner asserts that there is a split of authority on whether the definition of "employer" under Title VII can provide individual liability to a supervisor. This is incorrect. All of the circuits that have clearly addressed the issue have decided individual liability does not exist under Title VII. *See*, *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-17 (2d Cir. 1995); *Dici v. Pennsylvania*, 91 F.3d 542, 552 (3d Cir. 1996); *Lissau v. Southern Food Serv.*, 159 F.3d 177, 180-81 (4th Cir. 1998); *Harvey v. Blake,* 913 F.2d 226, 227-28 (5th Cir. 1990); *Hiler v. Brown*, 177 F.3d 542, 546 (6th Cir. 1999); *Williams v. Banning*, 72 F.3d 552, 553-55 (7th Cir. 1995); *Smith v. St. Bernards Regional Medical Ctr.*, 19 F.3d 1254, 1255 (8th Cir. 1994); *Miller v. Maxwell's Int'l*, 991 F.2d 583, 587-88 (9th Cir. 1993); *Haynes v. Williams*, 83 F.3d 898, 898-901 (10th Cir. 1996); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991). It should be noted that all of these cases are more current than those cited by Petitioner to support his position that Title VII provides individual liability. Further, Respondent was unable to locate a single circuit court decision decided since 1990 supporting the Petitioner's position.

Petitioner offers case citations from the Fourth, Fifth, and Tenth Circuit Courts of Appeals as authority for the proposition that Title VII permits individual liability for supervisors. A review of these cases and subsequent holdings of these circuits on this issue shows that this proposition is actually not the law in any of the circuits. For example, Petitioner completely misstates the holding of the Tenth Circuit. In *Sauers v. Salt Lake County*, 1 F.3d

1122, 1125 (10th Cir. 1993), cited by Petitioner, the following statement is made: "Under Title VII, suits against individuals must proceed in their official capacity; individual capacity suits are inappropriate." This holding certainly does not support Petitioner's position.

Likewise, Petitioner's reliance on *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986) as showing that the Fifth Circuit permits individual liability for supervisors under Title VII is incorrect. Subsequent to *Hamilton*, in *Harvey v. Blake*, 913 F.2d 226, 228 (5th Cir. 1990) the Fifth Circuit explicitly held that to the extent *Hamilton* is inconsistent with the rule that public officials may be liable under Title VII in their official capacity only, "*Hamilton* is nonauthoritative." Similarly, the Fourth Circuit has made clear that it's previous holding in *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), cited by Petitioner as supporting individual liability, is inapplicable in "personnel decisions of a plainly delegable character," such as in the present case. *See*, *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-11, n. 1 (4th Cir.), *cert. denied*, 513 U.S. 1058, 130 L. Ed. 2d 600, 115 S. Ct. 666 (1994).

Thus, contrary to Petitioner's position, there does not appear to currently be any split of authority on the issue of individual liability of a supervisor under Title VII. Moreover, this Court itself in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762-763 (1998) held that "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." Of course, as stated above, there is no reason to even consider Title VII law at all, given that this case involves the FCA and section 1983 only, and ample authority supports the lower court's ruling on that basis. Petitioner's employer was AGFC, which was dismissed from the case, and that

dismissal was never appealed. This issue provides no basis for granting certiorari.

C. The reasoning of the court below was not erroneous so as to warrant certiorari.

Petitioner argues that the lower court erred in finding that in order for him to succeed in his FCA *qui tam* claim, he would have to show that the Respondents, in their individual capacities, knowingly made false claims for government reimbursement. This argument is baseless. As set forth above, the only FCA claims which were preserved for appellate review were those claims against the Respondents individually.

The Eighth Circuit accurately noted that in order to make a *prima facie* case under the FCA, Petitioner had to show that (1) the defendant made a claim against the United States; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent; citing *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa HHS*, 269 F.3d 932 (8th Cir. 2001). Since AGFC had been dismissed, Petitioner had to establish these elements against the individual Respondents to make his *prima facie* case. Both the District Court and the Circuit Court held that Petitioner submitted insufficient proof to meet these elements. As stated above, a writ of certiorari is not granted merely to review evidence. *General Talking Pictures Corp. v. Western Electric Co.*, *supra.*

Petitioner puts forward a strained argument that the lower court's ruling that he needed to prove false claims made by the Petitioners in their individual capacities was error since the alleged liability of the Commissioners is based on "the failure of each one to perform their duties"

and the fact that the Commissioners are "responsible for the actions of the Director." Besides the fact that this argument is difficult to follow and would only possibly apply to liability of the Commissioners in their "official capacities," Petitioner has done nothing to demonstrate how this theory in conjunction with the decision below presents in any way a radical departure by the lower court from the accepted and usual course of judicial proceedings sufficient to warrant this Court's consideration.

Petitioner states that the Commissioners, "in their professional capacities," are responsible for "all aspects of the AGFC." Even taking this statement as true, recall that the Commissioners in their official capacities are not parties to this appeal, having been dismissed in an order that was never appealed. Petitioner further infers that the gist of his complaints against the Commissioners are incompetence or malfeasance, neither of which are actionable under the FCA or section 1983 claims he made here.

1. Fraud

Petitioner asserts that he presented "overwhelming evidence of fraud in the AGFC." Though Respondents dispute that such proof is in the record, even assuming that proof of fraud exists, this does not automatically equate to a violation of the FCA or section 1983. Again, the basis for dismissal of Petitioner's case was his failure to provide any evidence to establish the elements of his claims as to the Respondents in their individual capacities. A case dismissed on such grounds should not be reviewed yet again.

In fact, entirely dispositive in this case is the fact that Golden has testified by deposition that he has no

knowledge of any false claims which were known by either the Director or the Commissioners! Again, Petitioner's proof failed to establish any knowledge of any fraud against the government by these Respondents, which is an element necessary for an FCA claim.

2. Due Process

Petitioner simply restates here his argument below that he had a property interest in his employment at AGFC. However, he fails to address the accurate statement of the relevant law on this point which was addressed by the District Court, and adopted *in toto* by the Eighth Circuit. That law, that Petitioner was an employee at will, was accurately stated and applied, and doomed Petitioner's due process claims. In any event, the evidence below was that an administrative investigation was held to review the facts of his insubordination before Golden's discharge. Written notice of the investigation was given to Golden's then-attorney informing him that he could attend if he wished. The attorney did not attend.

Petitioner further argues that he had a property interest in his employment "due to his length of service and continued expectancy of employment," citing *Pearson v. City of Paris*, 839 F. Supp. 645 (W.D.Ark. 1993). This district court case makes no such holding or finding. The *Pearson* court found that a fired police chief had a property interest in his job based solely on a specific state statute that set forth the methods by which cities could hire and fire chiefs of police. No part of the *Pearson* holding was in any way based on length of service, and the holding provides no support for Petitioner's assertion of a property right in his employment with AGFC.

At this point in his Petition, Petitioner once more incorrectly states that the timing of his first demotion "occurred almost immediately after his conference with Bobby Hogue." As noted previously, the facts including Hogue's testimony and the allegations in Golden's original Complaint, show that Petitioner's conference with Hogue occurred over two years before Petitioner's demotion. Petitioner has simply misrepresented facts to this Court. Moreover, this is yet again an example of the failure of proof of Petitioner's claim below, not the sort of issue to merit certiorari review.

On this due process claim, Petitioner admits that Respondents offered evidence of his insubordination as the basis for his discharge, and acknowledges that it was his burden to offer proof to establish this as a pretext. Yet the only proof offered is the fact that Petitioner received a commendation letter recognizing his fifteen years of service a few months prior to his final insubordinate acts and subsequent termination. This was unpersuasive below, and remains so. It simply relates to the evaluation of the proof.

Curiously, next Petitioner begins a discussion of wrongful discharge law in Arkansas. Since Petitioner did not assert a wrongful discharge claim, this authority is misplaced. And again, Petitioner tries to invoke Title VII principles in this case, though no Title VII claims were ever asserted. Petitioner states that "deference is normally given to Title VII precedent in non Title VII claims." No authority is cited for this sweeping generalization. Petitioner then cites two Title VII cases from this Court, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Desert Palace Inc. v. Costa*, ___ U.S. ___, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003), maintaining that the lower

court's decision herein is counter to these cases, but without explanation. Neither of these cases provide support for Petitioner's positions here. No basis for granting the writ of certiorari has been shown by Petitioner and, accordingly, such relief should be denied.

CONCLUSION

In response to Petitioner's claims, the Respondents offered a nondiscriminatory reason for the demotion and discharge of Petitioner, namely his admitted disobedience of AGFC directives. The lower courts properly noted that Petitioner failed to produce proof sufficient to establish that this stated reason was pretextual. Petitioner's case failed due to his lack of proof on the elements of his FCA and section 1983 claims, and a failure of proof to causally link the Respondents individually to his discharge. Petitioner simply did not offer sufficient evidence to sustain his claims as a matter of law.

For the reasons set forth above, Petitioner has demonstrated no issue which meets this Court's threshold for granting a writ of certiorari. The decision below is supported factually and legally, and this case does not present any compelling reason for the Court to review this case.

Petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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